

§ 502.403

to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, fact-finding, minitrials, arbitration, and use of ombuds, or any combination thereof;

(b) *Award* means any decision by an arbitrator resolving the issues in controversy;

(c) *Dispute resolution communication* means any oral or written communication prepared for the purposes of a dispute resolution proceeding, including any memoranda, notes or work product of the neutral, parties or nonparty participant; except that a written agreement to enter into a dispute resolution proceeding, or final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication;

(d) *Dispute resolution proceeding* means any process in which an alternative means of dispute resolution is used to resolve an issue in controversy in which a neutral is appointed and specified parties participate;

(e) *In confidence* means, with respect to information, that the information is provided—

(1) With the expressed intent of the source that it not be disclosed; or

(2) Under circumstances that would create the reasonable expectation on behalf of the source that the information will not be disclosed;

(f) *Issue in controversy* means an issue which is material to a decision concerning a program of the Commission, and with which there is disagreement—

(1) Between the Commission and persons who would be substantially affected by the decision; or

(2) Between persons who would be substantially affected by the decision;

(g) *Neutral* means an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy; and

(h) *Person* has the same meaning as in 5 U.S.C. 551(2).

§ 502.403 General authority.

(a) The Commission intends to consider using a dispute resolution proceeding for the resolution of an issue in controversy, if the parties agree to a dispute resolution proceeding.

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(b) The Commission will consider not using a dispute resolution proceeding if—

(1) A definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;

(2) The matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency;

(3) Maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;

(4) The matter significantly affects persons or organizations who are not parties to the proceeding;

(5) A full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; and

(6) The Commission must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the Commission's fulfilling that requirement.

(c) Alternative means of dispute resolution authorized under this subpart are voluntary procedures which supplement rather than limit other available agency dispute resolution techniques.

§ 502.404 Neutrals.

(a) A neutral may be a permanent or temporary officer or employee of the Federal Government or any other individual who is acceptable to the parties to a dispute resolution proceeding. A neutral shall have no official, financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all parties and all parties agree that the neutral may serve.

(b) A neutral who serves as a conciliator, facilitator, or mediator serves at the will of the parties.

(c) With consent of the parties, the Federal Maritime Commission Dispute Resolution Specialist will seek to provide a neutral in dispute resolution proceedings through Commission staff, arrangements with other agencies, or on a contractual basis.

(d) *Fees.* Should the parties choose a neutral other than an official or employee of the Commission, fees and expenses shall be borne by the parties as the parties shall agree.

§ 502.405 Confidentiality.

(a) Except as provided in paragraphs (d) and (e) of this section, a neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided in confidence to the neutral, unless—

(1) All parties to the dispute resolution proceeding and the neutral consent in writing, and, if the dispute resolution communication was provided by a nonparty participant, that participant also consents in writing;

(2) The dispute resolution communication has already been made public;

(3) The dispute resolution communication is required by statute to be made public, but a neutral should make such communication public only if no other person is reasonably available to disclose the communication; or

(4) A court determines that such testimony or disclosure is necessary to—

(i) Prevent a manifest injustice;

(ii) Help establish a violation of law; or

(iii) Prevent harm to the public health or safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.

(b) A party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication, unless—

(1) The communication was prepared by the party seeking disclosure;

(2) All parties to the dispute resolution proceeding consent in writing;

(3) The dispute resolution communication has already been made public;

(4) The dispute resolution communication is required by statute to be made public;

(5) A court determines that such testimony or disclosure is necessary to—

(i) Prevent a manifest injustice;

(ii) Help establish a violation of law; or

(iii) Prevent harm to the public health and safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential;

(6) The dispute resolution communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award; or

(7) Except for dispute resolution communications generated by the neutral, the dispute resolution communication was provided to or was available to all parties to the dispute resolution proceeding.

(c) Any dispute resolution communication that is disclosed in violation of paragraph (a) or (b) of this section shall not be admissible in any proceeding relating to the issues in controversy with respect to which the communication was made.

(d) (1) The parties may agree between or amongst themselves to alternative confidential procedures for disclosures by a neutral, and shall inform the neutral before commencement of the dispute resolution proceeding of any modifications to the provisions of paragraph (a) of this section that will govern the confidentiality of the dispute resolution proceeding, in accordance with the guidance on confidentiality in federal proceedings published by the Interagency ADR Working Group and adopted by the ADR Council (<http://www.financenet.gov/financenet/fed/iadrwg/confid.pdf>). If the parties do not so inform the neutral, paragraph (a) of this section shall apply.